

---

# Chapter 5

---

## Categorical Exclusions

To assess the basis and process for establishing categorical exclusions,<sup>67</sup> the task force interviewed many Federal agencies and reviewed public comments. Additionally, CEQ was interviewed to gain their perspective regarding the process used to approve new categorical exclusions. Based on information received, the task force focused its efforts on three areas:

- ❖ Documenting categorical exclusions;
- ❖ Categorical exclusion development and revision; and
- ❖ Categorical exclusion approval process.

Improving and modernizing categorical exclusions should be addressed through both immediate and long-term actions. Immediate actions include CEQ issuing categorical exclusion guidance to clarify and provide direction regarding existing regulations and guidance. The task force believes that the new guidance should be included in a CEQ handbook. Development of a handbook is a long-term action that should not delay issuance of clarifying guidance by CEQ. While the task force believes that none of its categorical exclusions recommendations should require changes to existing CEQ regulations, if regulation revision is necessary, a categorical exclusion work group led by CEQ and including NEPA practitioners and legal counsel should be formed. Revisions resulting from the work group's efforts should be incorporated into the proposed handbook.

### 5.1. Documenting Categorical Exclusions

The agencies interviewed indicated some confusion about the level of analysis and documentation required to use an approved categorical exclusion, although CEQ

---

<sup>67</sup> A category of actions that do not individually or cumulatively have a significant effect on the human environment and, therefore, preparing an EA or an EIS is not required unless extraordinary circumstances indicate otherwise. 40 C.F.R. § 1508.4.

---

consistently has stated that categorical exclusions should have minimal, if any, documentation developed at the time of the specific action application. Additionally, CEQ strongly discourages procedures that require additional paperwork to document that an activity has been categorically excluded.<sup>68</sup> In their interview with the task force, CEQ stated that only documentation used to establish the categorical exclusion is required. However, some courts have found the need for some documentation at the time a specific categorical exclusion is used that explains that the proposed action fits the category relied upon in the agency's NEPA procedures and that there are no extraordinary circumstances in which such a normally excluded action may have a significant environmental effect.<sup>69</sup> Many agencies interviewed stated that their own internal procedures require documentation of project-specific categorical exclusions partly due to concern about potential litigation.

Another issue affecting the efficient use of categorical exclusions is agency perception that they are difficult to develop and/or revise. As a result, some agencies choose to continue to prepare EAs when a categorical exclusion would suffice. One agency representative noted that a perception exists that producing a short EA to document an action once is easier than documenting the development of a new categorical exclusion and then documenting the use of the categorical exclusion. Additionally, agencies sometimes think that documentation is needed when it might not be entirely clear why the proposed action is consistent with an existing categorical exclusion. When this occurs, the perception might be that the agency is "stretching" an existing categorical exclusion. In these situations, CEQ should support agency efforts to efficiently establish new categorical exclusions that clearly describe the category of actions and will not require such additional documentation.

Some agencies expressed an interest in using other agencies' existing categorical exclusions. CEQ categorical exclusion approvals are predicated on the agency's mission, assumptions, and past experiences; the agency must make its own determination that a particular category of actions does not have significant impacts. However, one agency might use another's experiences and documentation as a benchmark to establish their own categorical exclusion.

## **5.2. Categorical Exclusion Development and Revision**

Developing and updating categorical exclusions occurs infrequently, and the process varies from agency to agency. Most agencies have lists of categorical exclusions that were approved 10 or more years ago. Several Federal agencies have recently updated their categorical exclusion lists and others are considering doing so.

Developing and updating categorical exclusion lists is generally a headquarters-based initiative that relies heavily on field input. The updating process usually begins with a data request from headquarters to the field offices. The data gathered and submitted are used to develop the proposal for new and revised categorical exclusions. For

---

<sup>68</sup> Council on Environmental Quality, "Guidance Regarding NEPA Regulations," 48 Fed. Reg. 34,263 (July 28, 1983), available at <http://ceq.eh.doe.gov/nepa/regs/1983/1983guid.htm>.

<sup>69</sup> *California v. Norton*, 311 F.3d 1162, 1175-78 (9th Cir. 2002).

---

existing categorical exclusions, it is often difficult to locate or reconstruct the administrative record. For new categorical exclusions, field offices often consider gathering data and developing proposals exhaustive processes that interfere with other workload priorities.

### **5.2.1. Supporting a Determination of No Significance**

When developing new or broadening existing categorical exclusions, a key issue confronting most agencies is how to evaluate whether a proposed categorical exclusion is appropriate and how to support the determination that it describes a category of actions that do not individually or cumulatively have a significant effect on the human environment. A second important issue is improving agency consultation with CEQ, and ensuring that it occurs in a timely fashion.

In developing categorical exclusions, most agencies use information from past actions to establish the basis for the no significant effect determination. That is, agencies evaluate past actions that occurred during a particular period and determine how often the NEPA analyses resulted in FONSI for the category of actions being considered. Most agencies conclude that an adequate basis for developing and establishing new categorical exclusions exists if all the evaluated past actions resulted in FONSI.

Few agencies have used post-implementation monitoring to validate an EA's predictive analysis. Although some agencies indicated that such monitoring is valuable, available NEPA-process resources limit their ability to perform such analyses. Conducting post-implementation monitoring might increase the public's trust of agency NEPA compliance and environmental stewardship. Additionally, post-implementation studies that validate the environmental effects predicted in EA/FONSI provide strong support for any proposed categorical exclusion (see the Adaptive Management and Monitoring chapter of this report).

### **5.2.2. Importance of the Administrative Record**

Recently, interest groups and CEQ have expressed an increased interest in categorical exclusion development. The heightened attention has largely been focused on ensuring that the administrative record supports the determination that the category of actions does not individually or cumulatively result in a significant effect on the human environment.

In the absence of environmental effects monitoring, or in addition to such monitoring, an agency can provide or develop other information for its administrative record to support the analysis for categorical exclusions, including documentation of:

- ❖ Professional staff and expert opinions;
- ❖ Research study results;
- ❖ Past NEPA action records; and
- ❖ Similar categorical exclusion actions by other agencies.

---

CEQ is interested in understanding the entire body of knowledge associated with an agency's proposed categorical exclusion. A comprehensive and complete administrative record facilitates consultation with CEQ and provides support for the new or revised category of actions.<sup>70</sup>

It is often difficult to locate or reconstruct the administrative record for agencies with dated categorical exclusion lists. CEQ suggested to the task force that agencies conduct periodic reviews of how existing categorical exclusions are used, how frequently EAs for repetitive actions result in FONSI, and then establish comprehensive databases, preferably electronic. While the criteria for identifying new categorical exclusions might vary from agency to agency, some candidates for categorical exclusions include repetitive actions that do not individually or cumulatively have significant effects on the human environment, those that generally require limited environmental review, and those that are noncontroversial.<sup>71</sup> The task force believes that CEQ should work with agencies to clarify appropriate criteria for categorical exclusions, and encourage agencies to identify additional categories that meet the criteria.

### **5.2.3. Benchmarking Categorical Exclusions**

A few agencies benchmark their proposed categorical exclusions with the same or similar categorical exclusions already established by other agencies. This benchmarking serves as a basis to establish their administrative record to support their no significant effects determination. Some criteria that might be applied to benchmarking, and should be considered by CEQ during consultation, include a comparison of:

- ❖ Agency missions;
- ❖ Actions implemented to conduct the missions;
- ❖ Environmental conditions of the actions; and
- ❖ Conditions, including environmental, under which the actions are typically taken.

### **5.2.4. Regional Categorical Exclusions**

The task force asked agencies if they thought that categorical exclusions developed for application only in specified regions would be useful. While a few agencies thought that regional categorical exclusions might be valuable when specific actions are only conducted in a particular area, most agencies indicated that developing them would be an inefficient use of their time. Many of agencies thought that the process of establishing categorical exclusions is too labor and time intensive to warrant establishing categorical exclusions that have only limited application. Instead, most agencies believe that categorical exclusions should be applied to as wide a geographic area as possible to be the most effective.

---

<sup>70</sup> 40 C.F.R. § 1507.3.

<sup>71</sup> For example, when there are no successful administrative appeals or litigation or letters opposing the action based on environmental issues.

---

### 5.3. Categorical Exclusion Approval Process

Most of the Federal agencies that the task force interviewed indicated that the categorical exclusion approval process is cumbersome and ill defined. They believe that it takes too long to develop new categories of actions, citing lengthy agency approval processes and a prolonged CEQ review period. However, when probed, the agencies revealed that revisions to agency NEPA implementing procedures established simultaneously with new categorical exclusions are prompting lengthy internal and CEQ reviews. Several agencies also acknowledged that their review is often the most time consuming part of the categorical exclusion development and approval process.

#### 5.3.1. Informal CEQ Consultation

Some agencies are consulting with CEQ to obtain concurrence on revisions to all of their procedures implementing NEPA, including categorical exclusions, while others are focusing on revising their categorical exclusions. Most Federal agencies interviewed admitted that they are unclear about CEQ's categorical exclusion review process. As a result, many agencies avoid the task, preferring to "make do" with the categorical exclusion that they have.

Agencies can informally consult with CEQ at any time when developing a proposal to establish or revise a categorical exclusion. Once a categorical exclusion proposal is developed, most agencies consult with CEQ before publication in the Federal Register. Sometimes, agencies do not ask for CEQ input until the Federal Register notice is released. CEQ strongly recommends early consultation to ensure that agency efforts are focused, and that CEQ advice is considered when the proposal is developed.

#### 5.3.2. Formal CEQ Review

When CEQ receives a proposed categorical exclusion for review, it discusses the general nature of the supporting evidence with the agency. When the proposed categorical exclusions are unique, precedent setting, or heightened public interest is likely, CEQ might request review of the administrative record; this is not usually anticipated by the agencies. CEQ's comments at this stage might be lengthy, result in revision, and require a second review before publication in the Federal Register. CEQ commented to the task force that a significant period of time may pass before the agency responds to CEQ regarding questions and revisions.

Following receipt of public comments to the Federal Register notice, a proposed categorical exclusion is modified and agencies usually submit a memo or letter to CEQ discussing the substantive comments received, and indicating how they were addressed. CEQ then reviews the proposed categorical exclusion for conformity with NEPA and the CEQ implementing regulations and when appropriate provides a letter of conformity. The regulations provide CEQ with 30 days to review the proposed

---

<sup>72</sup> 40 C.F.R. § 1507.3.

---

categorical exclusion and determine conformity.<sup>72</sup> The process concludes when an agency publishes a notice of its final action on the categorical exclusion in the Federal Register.

### **5.3.3. Public Involvement**

CEQ regulations require that agencies make diligent efforts to involve the public in preparing their NEPA procedures.<sup>73</sup> Some comments received by the task force indicated that the public is generally neither aware of nor involved in the categorical exclusion approval process. Most of the agencies interviewed indicated that their public involvement was limited to the required Federal Register notice and comment period; most agencies use a 30- or 45-day public comment period. Factors that influence the length of the comment period include whether agency NEPA procedures are codified, and the level of public interest in the agency mission and actions.

The task force believes that agencies should consider involving the public in preparing major changes to categorical exclusions, and that CEQ should help agencies improve their public outreach. CEQ should encourage agencies, through clarifying guidance, to scale public outreach to the extent of the proposed changes to the categorical exclusion. Depending on the category of action proposed for approval or revision, public and stakeholder meetings might be appropriate. Improved public involvement would likely save agency time and money by avoiding controversy and potential legal challenges when a new categorical exclusion is proposed, and when it is used.

### **5.4. Resource Constraints**

Most agencies conduct the NEPA process under constrained resources; available resources are generally dedicated to accomplishing the many activities associated with their primary missions. Limited resources require agencies to focus on urgent NEPA actions, which are usually those that provide short-term benefits, such as preparing a specific EA rather than actions that would provide more long-term benefits, such as establishing new categorical exclusions. Because CEQ is also resource constrained, review timelines can vary greatly and are usually determined by the quality of the administrative record and an agency's responsiveness. CEQ strives to provide comments within a 30-day time frame; however, this is often difficult to achieve particularly for complex or controversial proposals.

Resource constraints and lack of clear guidance are reasons given by many agencies for the delay in the categorical exclusion approval process. The task force believes that agency funds could be more effectively used if categorical exclusion development and use were more widely encouraged and conducted, and if the resources that are currently dedicated to EA development were available for other types of agency environmental analyses and actions.

---

<sup>73</sup> 40 C.F.R. § 1506.6.



---

## 5.5. Issues and Recommendations

Throughout this chapter, the task force has discussed issues and recommendations that it believes CEQ should consider and address to reduce delays and clarify the process for establishing and using categorical exclusions. All the issues and recommendations are presented in this section.

To promote consistent categorical exclusion development and use, the task force recommends CEQ should expeditiously issue clarifying guidance to:

- ❖ Address the documentation prepared at the time a categorical exclusion is used.<sup>74</sup> CEQ should consult with department and agency counsel and the Department of Justice when developing this guidance.
- ❖ Suggest methods and information, such as post-implementation monitoring and effects analyses and studies, categorical exclusion benchmarking studies, and statements of agency professionals, which agencies can use to determine whether a category of activity does not individually or cumulatively have a significant effect on the human environment.
- ❖ Encourage agencies to develop categorical exclusions, where appropriate, based on broadly defined criteria that will provide the agency with sufficient flexibility, and encourage the agency to offer several examples of activities frequently conducted that would usually fall within the categories.
- ❖ Emphasize that agencies should periodically review and update their categorical exclusions, and their procedures for adding, revising, or deleting categorical exclusions. The guidance should also encourage agencies to establish a mechanism to track suggestions from their field offices for developing or revising their categorical exclusions. The guidance should emphasize the benefits of having such information for purposes of establishing categorical exclusions.
- ❖ Clarify the CEQ review process and provide a renewed commitment to meeting the CEQ 30-day period for reviewing proposed categorical exclusions.
- ❖ Encourage agencies to expand public outreach beyond the Federal Register notice and comment period to facilitate more public involvement in changing their categorical exclusions and to scale outreach to the extent of the proposed changes to the categorical exclusions.

## 5.6. Summary of Recommendations

The task force recommends that CEQ issue guidance to clarify and promote consistent practices for the development, documentation, public review, approval, and use of categorical exclusions by Federal agencies.

---

<sup>74</sup> Council on Environmental Quality, "Guidance Regarding NEPA Regulations," 48 Fed. Reg. 34,263 (July 28, 1983), available at <http://ceq.eh.doe.gov/nepa/regs/1983/1983guid.htm>